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*A5692.0428*

February 16, 2005

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**Ex Parte Presentation**

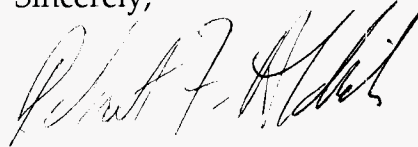
Marlene H. Dortch, Secretary  
Federal Communications Commission  
The Portals  
445 12<sup>th</sup> Street, S.W., TW-A325  
Washington, DC 20554

**Re: CC Docket No. 96-128, Illinois Public Telecommunications Association,  
Petition for Declaratory Ruling**

Dear Ms. Dortch:

On February 15, 2005, Albert H. Kramer and Robert F. Aldrich of Dickstein Shapiro Morin & Oshinsky, on behalf of the American Public Communications Council ("APCC"), met with Tamara Preiss, Chief of the Pricing Policy Division, Wireline Competition Bureau, and Ron Stockdale and Lynne Engledow of the Division staff. We discussed the matters summarized in the attached document which was previously submitted in this docket.

Sincerely,



Robert F. Aldrich

Enclosure

cc: Scott Bergmann

## APCC'S POSITION ON THE MERITS OF THE NST REFUND ISSUE

### I. THE SECOND WAIVER ORDER REQUIRED REFUNDS WHEREVER BOCS WERE ALLOWED TO BEGIN COLLECTING PAYPHONE COMPENSATION BEFORE COMPLYING WITH THE NST

- *Was NST compliance a pre-condition to the BOCs collecting dial-around compensation?*
  - *PSP position:* Yes.
  - *BOC position:* No.
  - *Why the PSP position should prevail:* This point was settled long ago by the clear language of the Commission's 1996 and 1997 orders.
- *Which rates are subject to the Second Waiver Order's refund requirement?*
  - *PSP position:* The *Second Waiver Order* applied wherever a BOC made a compliance filing after the waiver was granted.
  - *BOC position:* The *Second Waiver Order* applied only where BOCs specifically proposed new payphone line rates, and only to the rates they proposed to change.
  - *Why the PSP position should prevail:*
    - The BOCs were allowed to begin collecting dial-around compensation and thus received the benefit of the waiver wherever they made a compliance filing by May 19, 1997, regardless of its content. To require BOCs to pay refunds only if they proposed to reduce their rates would unfairly penalize BOCs that sought to comply while rewarding BOCs who did not seriously attempt to comply, but instead left non-compliant rates in effect. The *Second Waiver Order* rationally sought (1) to protect all BOCs whose existing rates might not comply with the NST on the date of the waiver and (2) to protect PSPs and the public from regulatory delays that could prolong inflated payphone line rates in violation of the *Payphone Orders*.
- *To what time periods does the Second Waiver Order refund requirement apply?*
  - *PSP position:* The waiver and refund requirement applies to the period from April 15, 1997 until the date that NST-compliant rates took effect.
  - *BOC position:* The waiver and refund requirement applied only to the period between the original compliance deadline, April 15, 1997, and the post-waiver filing deadline, May 19, 1997.

○ *Why the PSP position should prevail:*

- The *Second Waiver Order* required BOCs to pay refunds “if newly tariffed rates, *when effective*, are lower than the existing rates.” Refunds are required if the rate that actually *became effective* after review by the state public service commission in accordance with the correct standard was lower than the existing rate.
- The rate *filed* on May 19, 1997, was not automatically the NST-compliant rate; it was only the rate the BOC *claimed* to be NST-compliant. Frequently the filed rate was ultimately found to be non-compliant. If the Commission had cut off the refund as of the May 19 filing date and based the refund on the filed rate, PSPs would not be protected from continuing to pay inflated rates.
- The 45-day period in the *Second Waiver Order* was a limitation on the BOCs’ right to collect dial-around compensation without having non-compliant NST rates; it did not limit the BOCs’ obligation to pay refunds. The intent of the 45 days was to ensure that BOCs acted promptly to correct their rates. The purpose of the refund was to ensure that, even after the waiver expired, non-compliant BOCs could avoid losing eligibility for dial-around compensation, by effectively ensuring that they were (retroactively) compliant as of April 15, 1997. Making the 45 days a limitation on refunds would have encouraged the BOCs to delay compliance, the exact opposite of the order's intent. Moreover, it would mean that BOCs with non-NST-compliant rates would not be protected from being subsequently found ineligible for dial-around compensation.

## II. EVEN WITHOUT THE SECOND WAIVER ORDER, REFUNDS ARE REQUIRED BY FEDERAL LAW

- *Non-compliance with the NST violated Section 276(a) of the Act and the Payphone Orders.* Refunding excessive charges is the normal remedy for unlawful carrier charges. Where a carrier has been found to assess charges in violation of rules issued by the Commission to prevent discrimination, PSPs have a right to claim refunds of the excess charges.
- Requiring the BOCs to refund the excess line charges unlawfully collected is preferable to the alternative remedy – requiring the BOCs to disgorge the compensation that they collected when they were not eligible to do so.
  - Refunding to interexchange carriers (“IXCs”) the dial-around compensation collected while a BOC was ineligible would be far more onerous to the BOCs than refunding the excess payphone line charges, and would provide an undeserved windfall for IXCs. By contrast, a

refund of excess line charges would return to PSPs money that they should never have had to pay in the first place.

### **III. THE FILED RATE DOCTRINE HAS NO IMPACT ON THE REFUND OBLIGATION**

- In requesting waivers, the RBOCs expressly waived any filed rate doctrine claims.
- The *Payphone Orders* adopted federal regulations and the *Second Waiver Order* imposed federal conditions for waiver of a federal requirement. The filed rate doctrine that the RBOCs are asserting is founded on state law. Even if otherwise applicable, the state filed rate doctrine cannot block federally mandated refunds.